

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLEES HARRY PORETSKY and
ARTHUR W. MACHEN, TRUSTEE, ET AL.**

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

—
No. 8546

101

JULIUS H. WOLPE, ET AL.,

v.

HARRY PORETSKY, ET AL.

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UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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**BRIEF FOR APPELLEES HARRY PORETSKY AND
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The object of Part I of this brief is to state and discuss the real issues involved in this appeal.

The object of Part II of this brief is to clarify and dissipate the confusion of irrelevant issues and claims presented by Appellants' brief.

PART I.

The questions involved are:

1. Was the denial by the District Court of Appellants' motion for leave to intervene an abuse of the discretion vested in that Court under F. R. P. C. 24 (b) (2) "Permissive Intervention"?
2. Was the judgment of the District Court denying Appellants' motion for leave to intervene appealable?

COUNTER-STATEMENT OF THE CASE.

This litigation was begun in February, 1942. It was an action by appellee Harry Poretsky against the Zoning Commission of the District of Columbia to declare null and void a change in the zoning of Parcel 70/100. (App. 3) By consent, appellees Machen were allowed to intervene as parties plaintiff (App. 22). The case was fully heard by Mr. Justice Bailey beginning March 29, 1943. Testimony was taken in open court, and the trial justice made a personal inspection of the parcel and the neighborhood. On April 2, 1943 the opinion of the court was filed (App. ~~42, 43~~^{44, 45}). On April 7, 1943 findings of fact and conclusions of law were filed and on the same day a final judgment was entered in favor of the plaintiff Poretsky (App. ~~77~~⁴⁶⁻⁵⁵).

The Zoning Commission on April 8, 1943 voted unanimously to take no appeal from the judgment of the court and directed the correction of its zoning plats to comply with said judgment (App. 75).

On May 6, 1943, after the expiration of the time limited by the Rules of the District Court for the filing of a motion for a new trial, Appellants filed a motion under F. R. C. P. 24 (b) (2) for leave to intervene in the cause for the purpose of moving for a new trial, or, in the alternative, to be allowed to appeal the judgment rendered in the main action. This motion was accompanied by appellants' proposed intervening petition (App. 57). After full argument before Mr. Justice Bailey, and the submission of briefs, the Court

rendered a written opinion denying the motion (App. 77). The order of denial was rendered May 21, 1943 (App. 78). On September 28, 1943 this special appeal was allowed (App. 79).

STATUTES AND RULES INVOLVED.

Federal Rules of Civil Procedure 24 (b) (2):

“Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant’s claim or defense and the main action have a question of law or fact in common. In exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

SUMMARY OF ARGUMENT.

The motion for leave to intervene was based on the “permissive intervention” provisions of F. R. C. P. 24 (b) (2). It was directed to the discretion of the District Court. No application to intervene as matter of right has been or could have been made. In denying the motion for leave to intervene the Court not only had the right to exercise its discretion and judgment, but in doing so followed the Rules and the established practice in the Federal court.

The time had elapsed within which a new trial could have been granted. Final judgment in the main action had been rendered and complied with before the motion of appellants had been filed. The Zoning Commission had decided not to appeal. It alone had the legal right to determine whether to appeal.

Under settled law and under the Rules of the District Court the motion was properly denied.

The order denying the motion was not appealable (1) because it was interlocutory; (2) because the District Court had not abused its discretion in denying the motion for leave to intervene; and (3) because under settled Federal practice appeals from orders denying permissive intervention are not allowed.

ARGUMENT.

Was the denial by the District Court of Appellants' Motion for leave to intervene an abuse of the discretion vested in that court under F. R. C. P. 24 (b) (2) "permissive intervention"?

As this motion expressed two objects its purposes will be dealt with separately.

As to its purpose of moving for a new trial of the main action. The final judgment had been entered April 7, 1943. F. R. C. P. 59 (b) limits the time for serving a motion for a new trial to ten days after the entry of judgment. Therefore after April 17, 1943 a motion for a new trial was too late. Appellants' motion was filed May 6, 1943. Obviously the Court could not have entertained appellants' motion for leave to intervene for the purpose of moving for a new trial. The opinion of the District Court expressly so decided (App. 77) and this is apparently conceded by appellants since there is no charge of abuse of discretion in regard to this.

But in addition to this the Court decided as a fact that aside from the limitation imposed by the F. R. C. P. 59 (b), the motion for a new trial "would have been overruled on its merits" (App. 77). The Court had recently completed the trial of the main action. He had made a personal inspection of the property involved and of the neighborhood. He had found "nothing stated in the intervening petition that would change my (his) views of the case even if the interveners were made parties to the suit" (App. 77). The exercise of the Court's judgment in this regard also is manifestly not an abuse of discretion.

Rich v. Lemmon, 15 App. D. C. 507, 509.

Ecker v. Potts, 72 App. D. C. 174, 112 F. (2d) 581.

American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 112 F. (2d) 669, 670 (C. C. A. 2d, 1940).

Palmer v. Guaranty Trust Co., 111 F. (2d) 115, 117 (C. C. A. 2d, 1940).

Therefore on the new trial issue the order of the trial court should be sustained.

Was the judgment of the District Court denying appellants' motion for leave to intervene appealable?

As to the purpose of the motion to appeal the judgment rendered in the main action. The Zoning Commission was the agency empowered by law to represent the public interest. (Act of March 1, 1920, 41 Stat. 500, Ch. 92; Title 5, Sec. 412, p. 141, D. C. Code of 1940; amended by Act of June 20, 1938, 52 Stat. 797, Ch. 534, Title 5, Sec. 413, p. 142, D. C. Code of 1940). It and it alone was vested with the authority and discretion to determine whether an appeal should be taken. By a divided vote and contrary to the recommendation of its (statutory) Zoning Advisory Council (Title 5, Sec. 417, p. 143, D. C. Code 1940), and of the Citizens' Zoning Advisory Council, the Zoning Commission had changed the zoning of the property here involved by restricting its use (App. 52, 53). When it reconsidered the matter in the light of the facts and the law presented to the Court, the Zoning Commission decided unanimously not to appeal the decision of the Court, and promptly complied with and carried out the judgment of the Court (App. 75). That it had the legal right to do this is not controverted by appellants.

When the final judgment in the main action had been carried out and the Zoning Commission had decided unanimously not to appeal the case, the Court was obliged, as matter of law, to deny appellants' motion.

In *United States v. California Co-op Canneries*, 279 U. S. 553, 556, 73 L. ed. 838, 841, 49 Sup. Ct. Rep. 423, the court said:

"The supreme court denied leave to intervene. The Canneries appealed to the court of appeals. That court, so far as appears, did not consider the question whether, in view of the Expediting Act, it had jurisdiction on appeal. *It did not refer to the decisions which hold that an order denying leave to intervene is not appealable* (Ex parte Cutting, 94 U. S. 15, 24 L. ed. 49;

Credits Commutation Co. v. United States, 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636; Re Leaf Tobacco Board of Trade, 222 U. S. 578, 581, 56 L. ed. 323, 32 Sup. Ct. Rep. 833; Re Engelhard & Sons Co., 231 U. S. 646, 58 L. ed. 416, 34 Sup. Ct. Rep. 258; New York v. Consolidated Gas Co., 253 U. S. 219, 64 L. ed. 870, 40 Sup. Ct. Rep. 511; New York v. New York Teleph. Co., 261 U. S. 312, 67 L. ed. 673, 43 Sup. Ct. Rep. 372), except where he who seeks to intervene has a direct and immediate interest in a res which is the subject of the suit (compare French v. Gapen, 105 U. S. 509, 524-526, 26 L. ed. 951, 956, 957; Smith v. Gale, 144 U. S. 509, 36 L. ed. 521, 12 Sup. Ct. Rep. 674; Leary v. United States, 224 U. S. 567, 56 L. ed. 889, 32 Sup. Ct. Rep. 599; Swift v. Black Panther Oil & Gas Co., 156 C. C. A. 448, 244 Fed. 20, 30). Nor did it refer to the *settled rule of practice that intervention will not be allowed for the purpose of impeaching a decree already made.*" (Italics supplied)

Smith v. Gale, 144 U. S. 509, 520, 36 L. Ed. 521, 524, 525.

American Book Co. v. Kansas, 193 U. S. 49, 52, 48 L. Ed. 613, 614.

United States v. Northern Securities Co., 128 Fed. 808, 810.

Board of Drainage Com'rs. v. Lafayette Southside Bank, 27 F. (2d) 286, 293 (C. C. A. 4th, 1928).

Radford Iron Co. v. Appalachian Electric Power Co., 62 F. (2d) 940 (C. C. A. 4th, 1933).

In *San Antonio Utilities League v. Southwestern Bell Telephone Company*, 86 F. (2d) 584-585 (C. C. A. 5th, 1936), the Telephone Company had sued the City of San Antonio, Texas, et al., in contested litigation over telephone rates. The litigation had continued over years and on the day the parties to the main action submitted to the Court a consent decree, the League, purporting to represent five thousand or more telephone subscribers, made an unsuccessful attempt to intervene in the suit in order to oppose the entry of the consent decree. The application for intervention was denied, and the appeal therefrom dismissed.

"Appellees, urging that the order was discretionary and not appealable, have moved on the authority of *In re Englehard & Sons*, 231 U. S. 646, 34 S. Ct. 258, 58 L. Ed. 416; *City of New York v. New York Tel. Co.*, 261 U. S. 312, 43 S. Ct. 372, 67 L. Ed. 673; *New York v. Consolidated Gas Co.*, 253 U. S. 219, 40 S. Ct. 511, 64 L. Ed. 870; *O'Connell v. Pacific Gas & Electric Co.* (C. C. A.) 19 F. (2d) 460, and *Wright v. Central Kentucky Natural Gas Co.*, 297 U. S. 537, 56 S. Ct. 578, 80 L. Ed. 850 to dismiss the appeal.

Appellants, recognizing the general rule to be that an order denying leave to intervene is a discretionary order, and therefore not a final one from which an appeal will lie, insist that their case is one of, and their motion presents, exceptional circumstances, taking the order appealed from here out of that rule.

We do not think so. *To the thoroughly settled rule that an order denying leave to intervene is not appealable*, *In re Cutting*, 94 U. S. 14, 15, 24 L. Ed. 49; *Credits Commutation Co. v. United States*, 177 U. S. 311, 20 S. Ct. 636, 44 L. Ed. 782, there is only one substantial exception, that he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit. *United States v. California Cooperative Canneries*, 279 U. S. 553, at page 556, 49 S. Ct. 423, 73 L. Ed. 838; *Lupfer v. Carlton* (C. C. A.) 64 F. (2d) 272; *Burrow v. Citizens' State Bank* (C. C. A.) 74 F. (2d) 929, 930. That, generally speaking, individual subscribers have no direct and immediate interest in a rate controversy and suit sufficient to authorize them to maintain or prosecute it, and that the matters involved in such a suit are matters entirely between the parties to it, the Utilities and the City, is settled by the authorities first above cited.

* * * * *

Entirely apart from the fact that the decree cannot be accepted in part, and rejected in part, but must be accepted or rejected as a whole, nothing in appellants' motion takes this case out of the general rule, *that the allowance or refusal of a petition to intervene is discretionary, and not a final order from which an appeal will lie.*" (Italics supplied)

Demulso Corp. v. Tretolite Co., 74 F. (2d) 805 (C. C. A. 10th 1934).

White v. Hanson, 126 F. (2d) 559 (C. C. A. 10th 1942).

Baltimore Trust Co. v. Interocean Oil Co., 30 F. Supp. 484, 485.

Board of Drainage Commissioners v. Lafayette Southside Bank, 27 F. (2d) 286, 293-294 (C. C. A. 4th, 1928).

“Nothing seems better settled than that an application of an intervener seeking to be admitted as a party to a pending cause is addressed to the sound discretion of the court, and where the application is denied, and such intervener left to avail himself of such rights as the law may afford him in other appropriate ways, that the order denying such application is an interlocutory, and not a final decree, and hence one from which no appeal lies. *Authorities to support this position might be cited almost without number, but the following cases from the Supreme Court of the United States will be found to be especially applicable and entirely conclusive of the subject:* Connor v. Peugh’s Lessee, 18 How. 394, 15 L. Ed. 432; Ex parte Cutting, 94 U. S. 14, 24 L. Ed. 49; Guion v. Liverpool, etc., Ins. Co., 109 U. S. 173, 3 S. Ct. 108, 27 L. Ed. 895; Credits Commutation Co. v. U. S., 177 U. S. 311, 316, 317, 20 S. Ct. 636 (44 L. Ed. 782).” (Italics supplied)

See also *Land Title & Trust Co. v. Asphalt Co.*, 127 Fed. 1, 21 (C. C. A. 3d, 1903).

PART II.

Appellant’s brief is a studied effort to avoid the basic legal questions involved on this appeal. At the same time it attempts to do by indirection what the law says cannot be done directly, namely, discuss the main action on this special appeal. In Part I of this brief the answers to the legal questions involved were presented. In Part II we shall endeavor to dissipate the confusion manifest in appellants’ brief. But we do not intend to submit the judgment in the main action on this appeal.

1. The Court should have certain basic facts in view in considering appellants’ brief. The suggestion is made re-

peatedly that appellants will suffer a loss now that the zoning of Parcel 70/100 has been restored to the zoning it enjoyed for years before the Zoning Commission attempted to change it. Appellants' alleged damage is not involved in this appeal.

(a) From the chronological zoning history of this property recited in the ~~Findings of Fact~~ ^{Appellate} (App. 35, 36) it will be seen that during various periods from the beginning of zoning in the District in 1920 some or all of this property could have been used for apartment-house purposes. From 1933 to November 1941 *all* of it could have been used for that purpose (App. 36).

In 1929 the United States acquired a part of the tract of which Parcel 70/100 is the remainder. The portion so acquired by the United States became a part of the Piney Branch Parkway, to the south and west of said parcel. That Parkway and the land so purchased were under the jurisdiction of the National Park Service, whose director was a member of the Zoning Commission (App. 50), which in 1933 revised the zoning of said Parcel 70/100 and restored its use as an entirety for apartment purposes, a use it continued to enjoy officially and of record in the Office of the Zoning Commission until the unlawful attempt to change it was made in November, 1941.

The records in the Office of the Assessor of the District of Columbia showed, the answer of the Zoning Commission admitted (App. 28), and the trial court found as a fact (App. 45, 48, 49) that the assessment on said Parcel was steadily increased from the rate of \$15,000 per acre in 1921 to \$28,000 per acre since 1930, and that these rates were substantially higher than those levied on neighboring properties, because they were primarily based on its zoning as an apartment-house site.

Furthermore, consistently since at least 1933, said Parcel had been offered for sale by practically every real estate broker and dealer in Washington as an apartment-house site, having been regularly zoned and taxed for such use

(App. 49). The real estate dealers who owned and sold the properties in the so-called Crestwood Area, which was developed after 1938 and in which most of the appellants reside, informed most of the purchasers of homes in Crestwood that Parcel 70/100 was zoned so as to permit an apartment building to be erected on that Parcel (App. 21-23).

(b) Appellants' proposed intervening petition is significantly silent regarding the inquiry made by appellants concerning the zoning of Parcel 70/100, nor is there any denial of their knowledge of the facts concerning said zoning.

On the other hand the Court found as a fact (App. 49, 50) that Appellee Poretsky, before executing the contract to purchase Parcel 70/100 in May, 1941, six months before the unlawful attempt to change the zoning complained of, had made careful inquiry into and study of the zoning history and status of the property, and of the record of its assessment, and had conferred with the Surveyor of the District and with officials of the Zoning Commission and of the electrical, plumbing, sewer, smoke regulation and building inspector's departments of the District Government, making full and open disclosure to them all of his purpose to erect an apartment building on said Parcel (App. 50, 51).

(c) Further, the Court found that he had made deposits aggregating \$17,500 on account of his purchase price of \$77,500, had spent more than \$8000 for plans, financing, engineering, etc., and had filed his application and plans for an apartment building on said Parcel, making a deposit of \$700 as the required portion of the fee for the building permit; that he had acted in good faith and had relied upon the public records of the Zoning Commission and of the District of Columbia (App. 51).

The Court made a personal inspection of the property and of the neighborhood. Based on its view and the evidence, the Court found that after the attempted restricted re-zoning the value of the Parcel was less than one-half of its value as an apartment-house site, and that its development with an apartment building would be more feasible

and desirable than it would be with separate single family dwellings (App. 54).

Should then the appellants, who either ignored the information as to the zoning given them by the real estate dealers, or who failed on their own account to make any inquiry or examination of the public records, cast upon appellee Poretsky the loss of thousands of dollars after he had diligently made the careful inquiry which a prudent man should have made to ascertain the facts?

"Sic utere tuo ut alienum non laedas" has an ironic ring indeed coming from appellants under these conditions. The application of the Golden Rule would be much more appropriate under the circumstances.

2. Was the motion for leave to intervene "timely"? F. R. C. P. Rule 24(b) authorizes permissive intervention only "upon timely application." The main action was filed in February, 1942. It was reached for trial in March, 1943. In this period of more than a year none of the appellants sought intervention. One of the appellants, John P. Labofish, who is a member of the Bar of the District Court (App. 76) and whose property lies close to Parcel 70/100, was in the Court House and knew that the case was on for trial (App. 64). Yet he did not make any representations or protest to the Trial Justice or to the Corporation Counsel. Instead, the appellants waited for nearly a month after the final judgment was rendered and complied with by the Zoning Commission before filing their motion for leave to intervene. And what excuse do they give? Merely that "many of the petitioners (appellants) offered their services to the Corporation Counsel's office in the trial of this case and in the giving of testimony and were told that they would be called upon if needed" (App. 63, 64).

Whether or not they should have been called as witnesses was a matter for determination by the Corporation Counsel and his Principal Assistant who conducted the defense of the main action. But certainly that is no excuse in law for laches. The application to intervene was not timely.

3. Three illustrations out of appellants' petition will serve to show the lack of factual basis of their position.

(a) As to singling out Parcel 70/100 for rezoning, appellants say that the Court erred when it found that the Zoning Commission took this Parcel 70/100 alone for rezoning and that if the Court had had before it the facts set forth in paragraph 21 of the proposed intervening petition no such finding could have been made.

For many years prior to the time when the rezoning was attempted in 1941, there had appeared on the official Zoning Map of the Zoning Commission a line drawn east and west through the center of Shepherd Street (which abuts this parcel on the north) between 16th and 17th Streets and of Shepherd Street between 16th and 14th Streets as said Street is indicated on the Highway Plan. *This was a zoning divisional line and constituted the northern boundary of a multiple-dwelling area as established by the Comprehensive Plan of the Zoning Commission long prior to November, 1941* (App. 48). Parcel 70/100 had been included in that multiple-dwelling area since it was established in 1921. Opposite this Parcel, just across 16th Street, is a triangular tract of land. That also was included in the multiple-dwelling area in said Comprehensive Plan. It was demonstrated by actual plans presented at the trial that it was practical to erect a small apartment building on this tract (App. 48). This is admitted in the proposed intervening petition (App. 61).

The Zoning Commission had never attempted to change its Comprehensive Plan of Zoning regarding this northern boundary of the multiple-dwelling area. When it attempted to re-zone Parcel 70/100 in 1941, it singled out that Parcel only. It did not re-zone the triangular tract opposite. Property on the south side of Shepherd Street near 14th Street and south of said divisional line is improved by row-houses. But this type of improvement is permitted in the same zoning classification as that theretofore enjoyed by Parcel 70/100 and the triangular tract. Those row houses

are still in the multiple-dwelling area, even though the land happens now to be used for single family dwellings. There is nothing in its zoning to prevent its present or future utilization for apartment buildings.

In short, the Zoning Commission did single out Parcel 70/100 for restricted re-zoning as the Court found after all the facts were fully presented.

(b) The attempted re-zoning of Parcel 70/100 in 1941 was based upon a petition filed before the Zoning Commission. Many, but not all, of the appellants were among those petitioners (App. 58) and many who petitioned are not among the appellants.

The files of the Zoning Commission are open to the public. Counsel for Poretsky had examined the petition for re-zoning and noted the names and addresses of the petitioners. The complaint filed in the District Court alleged (App. 7), and the answer of the Zoning Commission admitted (App. 29) that the properties of the vast majority of said zoning petitioners were two or more city blocks removed from said Parcel. The files of the Zoning Commission relating to this property were produced at the trial in the District Court (App. 37). The Court therefore had the facts upon which to make its finding (App. 52).

In this connection all that appellants claim is recited in paragraph 22 of said petition (App. 61): "While it may be true that a majority in number of those who objected and who now object" (not all of those who objected, but only a majority!) "lived at a distance of one or more blocks, it is also true that those whose property is as near to the proposed apartment house as it is possible to get are also affected." Certainly no further comment is necessary.

(c) One further illustration relates to the so-called Machen covenants. Appellants devote considerable discussion in the proposed intervening petition and in their brief to the so-called Machen covenants, which had nothing to do with the case below and are not involved in the case here, ex-

cept as another red herring being dragged across the trail to confuse the basic issues. No mention of said covenants appears in the Court's Findings of Fact, Conclusions of Law or final Judgment. The stipulation states that the appellees Machen owned all of the land on the *North side of Shepherd Street, opposite* said Parcel 70/100 (that is between 16th and 17th Streets) and that in making sales of any portion *thereof*, they have always inserted a clause in the deeds requiring the purchasers to agree not to ask for a change in the zoning of Parcel 70/100 which would prohibit or restrict the erection of an apartment building thereon; that they have sold some and retain some of the land on the north side of Shepherd Street opposite said Parcel. That is all.

But appellants allege that a number of deeds by Machen contain a restriction against the erection or maintenance of an apartment building on the properties so sold. What of it? In the first place zoning is not limited by covenants; in the second place Parcel 70/100 is not in any subdivision in which the properties mentioned by appellants appear; in the third place, appellants do not allege or claim that there is anything in the title to Parcel 70/100 which affects or is affected by covenants in the title to properties not only not "on the north side of Shepherd Street opposite said parcel," but actually on entirely different streets, some of them one or two blocks away from said Parcel. In short there is nothing in any of the covenants restricting the use of Parcel 70/100 as an apartment-house site.

4. One final matter should be noted. In their brief appellants entitled a phase of their argument "An attempted Interference with the Administrative Remedy." There they indulge in an entirely new issue, not raised in the Court below, or in the petition for Special Appeal, and not included in appellants' "Statement of Points" (App. 81). The raising of this new issue for the first time on this appeal is in contravention of Rule 11 (c)(6) of this Court and of FRCP 75 (d), and therefore the Court should not consider this alleged issue.

Appellants quote a portion of Title 5, Sec. 422, p. 145 of the D. C. Code 1940, but had they considered the entire section it would have become manifest to them that this section makes it unlawful to engage in the construction of improvements in the District in violation of the zoning regulations and without obtaining a building permit, which permit must conform to the zoning regulations. The enforcement of this provision is vested in the Corporation Counsel of the District of Columbia, but any neighboring property owner or occupant who would be specially damaged by any such "violation" may also institute legal proceedings to prevent the unlawful construction.

This provision has no bearing whatever upon the case at bar. Here appellee Poretsky made lawful application to the Building Inspector for a permit in compliance with the existing zoning of Parcel 70/100. While his application was pending, the Zoning Commission unlawfully changed the zoning. The District Court held the change to be "unreasonable, arbitrary, capricious and void" (App. 55). The institution of this suit was the only remedy open to appellee Poretsky, a remedy which has been available from time immemorial to correct the wrongs of the sort inflicted on said appellee. The Zoning Commission raised the theory of "exhaustion of administrative remedy" in *Hazen v. Hawley*, 66 App. D. C. 266, 272, 86 F. (2d) 217, but this Court held that this argument was not open to it.

There is no analogy in fact or in principle between the case at bar and those cited by appellants. *Meyers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 82 L. ed. 639, was a suit in which the District Court had enjoined the holding of a hearing by the National Labor Relations Board. The Circuit Court of Appeals had affirmed the District Court's judgment. The Supreme Court reversed because the plaintiff was fully protected by the statutory provision for review by the Circuit Court of Appeals of the Labor Board's decisions in which review "all ques-

tions of the jurisdiction of the board and the regularity of its decisions, all questions of constitutional right and statutory authority are open to examination by the Court." The statute there under consideration further provided that the review by the Circuit Court of Appeals "shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

Newport News Ship Building Corporation v. Schlauffer, 303 U. S. 54, 82 L. ed. 646, was a companion case arising under the National Labor Relations Act where, as in the preceding case, the application for an injunction was made to the District Court prior to a hearing before the Board, which application was denied and its action was affirmed by the Circuit Court of Appeals and by the Supreme Court.

Federal Power Commission v. Metropolitan Electric Company, 304 U. S. 375, 82 L. ed. 1408, was likewise a case seeking an injunction prior to disposition of the matter before the administrative body, namely, the Federal Power Commission. The application for an injunction was made directly to the Circuit Court of Appeals which, while granting the injunction, restricted the action of the Commission. Its judgment was reversed by the Supreme Court because there was no order of the Commission before the Circuit Court of Appeals for review.

United States v. Los Angeles and Salt Lake City Railroad, 273 U. S. 299, 71 L. ed. 651, was a suit to enjoin an order of the Interstate Commerce Commission purporting to determine the final value of railroad property. An injunction was granted by the District Court from which the case went directly to the Supreme Court of the United States. The judgment of the District Court was reversed, the Court holding that the order complained of was not an order which had any legal effect except to constitute prima facie evidence and that there was adequate statutory remedy for correction of errors in the order.

Morgan v. Hines, 72 App. D. C. 331, 113 F. (2d) 849, also cited by appellants, did not deal in any way with the question of exhaustion of administrative remedy.

The holding of the Supreme Court in *Nectow v. Cambridge*, 277 U. S. 183, 72 L. ed. 842, is entirely contrary to appellants' contention. This was a suit for a mandatory injunction against the enforcement of a zoning regulation. The State Court had denied the injunction and its judgment was reversed, the Supreme Court saying:

"The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. *Euclid v. Ambler Realty Co.*, supra, p. 395. Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case. That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the 14th Amendment and cannot be sustained."

This Court has followed and applied the *Nectow* case in *Bugher v. Gottwals*, 60 App. D. C. 340, 341, 54 F. (2d) 451, saying:

"To this bill, appellees filed a motion to dismiss, on the ground that a court of equity will not interfere with the exercise of discretion on the part of an administrative body, unless such action is palpably arbitrary. After hearing, the prayer for injunction was denied, and the bill dismissed, and it is from this decree that this appeal is taken."

After reviewing the Nectow case the Court, speaking through Chief Justice (then Associate Justice) Groner, reversed the decree from which the appeal had been taken.

The Act creating the Zoning Commission is silent as to an administrative remedy. Appellants fail to point out any statutory provision therefor. The local practice, as evidenced by the numerous cases filed in the District Court and the number decided by the Appellate Court, has definitely established the remedy. The District Court was not asked to substitute its judgment for the judgment of the Zoning Commission. It was asked to enjoin the unreasonable, arbitrary, capricious and void action of the Zoning Commission.

CONCLUSION.

Appellants sought permissive intervention in the main action, not intervention as a matter of right. The relief prayed for was leave to file a motion for a new trial, or, in the alternative, to appeal the judgment in the main action. Their application was filed too late to obtain a new trial, even if they had ground therefor, which the Court found they did not have. Their application to appeal the judgment was equally not timely, because the case was closed when they applied, the trial had been concluded, the judgment rendered and complied with; and also because their intervention would have unduly delayed or prejudiced the adjudication of the rights of the original parties. Nor did their pleadings show any compliance with the very rule (FRCP 24 (b)(2)) upon which they relied since they failed to show that their claim or defense and the main action had a question of law or fact in common.

Furthermore, appellants have failed to show any abuse of discretion by the District Court. The District Court had the right to assume that the allegations of the proposed intervening petition and appellants' other pleadings contained all of the material which appellants could submit, so that if cognizable at all as matter of law the Court

could weigh, consider and judge said material in the light of the evidence submitted on the trial of the main action. On their showing the District Court decided that in addition to the legal objections to their intervention there was nothing stated in the proposed intervening petition of appellants that would change the Court's view of the case.

Finally, the judgment of the District Court rendered in the exercise of its discretion under the appropriate Rules of Court and under the circumstances of this case and under the overwhelming decisions of the Courts, was not appealable, and therefore the special appeal should be dismissed.

Respectfully submitted,

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REPLY BRIEF OF APPELLANTS

IN THE
United States Court of Appeals
DISTRICT OF COLUMBIA

No. 8546

JULIUS H. WOLPE, ET AL., *Appellants,*

v.

HARRY PORETSKY, ET AL., *Appellees*

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED JAN 28 1944

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IN THE
United States Court of Appeals
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No. 8546.

JULIUS H. WOLPE, ET AL., *Appellants*,

v.

HARRY PORETSKY, ET AL., *Appellees*

REPLY BRIEF OF APPELLANTS

**WAS THE DENIAL BY THE DISTRICT COURT OF
APPELLANTS' MOTION FOR LEAVE TO INTER-
VENE AN ABUSE OF THE DISCRETION VESTED
IN THAT COURT UNDER F. R. C. P. 24 (b) (2)
"PERMISSIVE INTERVENTION"?**

Under the above subject the appellees have discussed the power of the court to review motions for a new trial (*Ecker v. Potts*, 72 App. D. C. 174; 112 Fed. (2d) 581) and power of the court to review an order in a probate case, aligning parties (*Rich v. Lemon*, 15 App. D. C., 507; cited on substantive law but not as to procedure in *Brosnan v. Brosnan*, 263 U. S. 345; 68 Law. 333) and similar subjects, for which Federal cases are cited.

This argument seems to imply that the motion made by these appellants is similar to the usual motion for a new

trial. The motion here was for the purpose of allowing the appellants to be heard in the trial court or to be allowed to appeal in this court. This was denied. The motion in the present case (App. 57) is for leave to be heard.. Appellants have been condemned without a hearing and they seek to be heard about it.

This same subject was considered in appellants' brief (pp. 14 to 18). The matter is treated under different subjects in the two briefs. The application of the appellants here is quite different from an ordinary motion for a new trial. The application for leave to intervene for the purpose of appeal (App. 57), has no analogy to the cases cited by the appellees.

**WAS THE JUDGMENT OF THE DISTRICT COURT
DENYING THE APPELLANTS' MOTION FOR
LEAVE TO INTERVENE APPEALABLE?**

Under the above caption, the appellees have attempted to review the action of this court in granting a special appeal (Appellees' Brief, p. 4). The matter was not discussed at length in the printed brief of appellants, on the theory that the court's action in granting a special appeal had determined the point. The point was discussed thoroughly in the original brief filed in support of the petition for special appeal and in the supplement to the brief filed by appellants in support of that petition. These briefs are in typewriting and perhaps inconvenient for the court to handle. If the court indicates a desire that the appellants should print that part of the brief, appellants will gladly do so but in the absence of some indication from the court, the appellants submit that the action of the court in granting a special appeal is a determination of it.

The citations under this section of appellees' brief seem to be from cases decided under the Federal statute with respect to appeals. There is a marked difference between the Federal statute (Title 28—Sec. 225-227 U. S. Code) and the District of Columbia statute (Title 17, Section 101 D. C.

Code). In the Federal statute, there is no provision comparable to the appellate jurisdiction of this court by which an appeal may be allowed, "From any other interlocutory order in the discretion of said United States Court of Appeals for the District of Columbia." Most of the cases cited by the appellees under the subject now discussed were cited in the opposition to the petition for special appeal and the action of the court in granting the special appeal seems to indicate that the court thought at that time that they were not applicable, as indeed they were not.

Smith v. Gale, 144 U. S. 509; 36 Law. 521, appellees' brief (p. 6), presents a different situation from that at bar. Two short quotations from this case will show the difference. On page 525 Lawyers' Edition, the court says:

"In this case, the petition not only fails to show any title in the intervenor and no beneficial claim to or lien upon the property in suit but it shows conclusively that such interest as she once had has been conveyed away."

Again on page 525, the court says:

"We are not disposed to hold that the court might not have permitted this complaint in intervention to be filed. But by Section 90 of the Code . . . such complaint must be filed by leave of the court, a limitation upon the right to intervene which presupposes a certain amount of discretion in the court."

The case of *American Book Co. v. Kansas*, 193 U. S. 49; 48 Law. 613-614, appellees' brief (p. 6), is not contrary to the position taken by these appellants. It is there held that one who voluntarily performs and satisfies a judgment or decree against him loses his right to appeal. The appellants whose rights are affected never have complied with the decree or been reconciled to it. The Zoning Commission obeyed the mandate of the court "forthwith to restore," (App. 56) but in the absence of a supersedeas bond, if such were permissible, that was their duty. Whatever letter the Zoning Commission wrote could not bind these parties.

The compliance with such a decree did not bar these parties from appeal.

In the case of *O'Hara v. McConnell*, 93 U. S. 152; 23 Law. Ed. 841, the following is stated (p. 843):

"It is said that, after making the deed which the court ordered, the appellant is bound by it, and cannot now prosecute this appeal.

"The principle is unsound. The deed recites on its face that it is made under the order of the court. The parties must either have obeyed the order of the court, or taken an appeal and given a supersedeas bond in a sum so large that they were probably unable to do it.

" 'In no instance within our knowledge,' says the court in *Erwin v. Lowry*, 7 How. 184, 'has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the court to restore the parties to their rights.' That was a case where the appellant received the money which by the decree he recovered of the appellee; and is, therefore, a stronger case than the present, as his action would seem to ratify the decree."

The position of appellants here is even better because of the public interest.

The following are also to the same effect:

Rose's Notes, Vol. 9, Page 301

Hoogendorn v. Daniel, 202 Fed. 430

Polk County v. Johnson, 21 Fla. 577

Case Note 29 L. R. A. (N. S.) 22

While local Civil Rule 20 is not entirely apposite because this is an application for leave to intervene and not one strictly by bill of review by one of the parties, that rule shows the policy of the law to prevent miscarriage of justice because of hasty and erroneous presentation of facts. There, as the court will see, no action for relief heretofore grantable by bill of review shall be commenced after two years from entry of the judgment. In the case at bar, the pro-

posed intervening petition shows (par. 32, App. 64) that the appellants made application to the Zoning Commission and counsel representing the Commission to appeal the decision and did not receive the determination on that subject until May 4, 1943 and they filed this proceeding on May 6, 1943. It is hard to conceive how they could have taken action sooner. The authorities cited by plaintiff's counsel emphasizing delay are inept. The same principle is shown by the recent amendment of Rule 10 (a) of the rules of this court changing the time for noting an appeal.

The policy there set forth in both rules is that justice shall not be defeated because of short time limit.

THE BASIC FACTS

In Part II of the appellees' brief (p. 8, *et seq.*) reference is made to certain basic facts.

The court below held in the Findings of Fact, "The action of the Zoning Commission in rezoning parcel 70/100 on November 7, 1941, as aforesaid, was unreasonable, arbitrary, capricious and void and should be vacated and set aside" (App. 55).

This finding may be regarded as basic.

In order to demonstrate the nature of this finding, the National Capital Park and Planning Commission has furnished the appellants certain zoning maps which are attached hereto, demonstrating the facts, either as shown in evidence or which will be shown in evidence more clearly by appellants, if they are permitted to offer any.

Map I shows the zoning on Feb. 1, 1926, before there was any quarrel about this property. It is entitled,

"Zoning Plan North and South of Piney Branch Parkway in Vicinity of 16th St., N. W., Showing Boundaries of Districts Before Extension of Parkway Which Began Feb. 1, 1926".

The court will note that as of that date only the Sixteenth Street side of parcel 70/100 was zoned to permit an apart-

ment house and that the apartment house that could be constructed was in C area, not A. The court will also notice that as of that time the Piney Branch Parkway had not been enlarged so as to abut on the parcel in question, nor extended to the west of the parcel in question, nor had it been extended east of Sixteenth Street.

Map II shows the situation as it was November 7, 1941, which the court below held arbitrary and capricious. This map is entitled:

“Zoning Plan North and South of Piney Branch Parkway in Vicinity of 16th St., N. W., Showing Zoning of Parcel 70/100 as Ordered by the Zoning Commission November 7, 1941”.

The court will note that as of this date, the Piney Branch Parkway had been enlarged so as to abut 70/100 at the south and Seventeenth Street on the west. It also abutted the property owned by many of these appellants fronting on Crestwood Drive, as will be seen by a comparison of the plat on page 67 of the appendix. The court will also note that Piney Branch Parkway has been enlarged as of this date to the east side of Sixteenth Street and that no apartment house was permitted by law to be erected either on the east or west side of Sixteenth Street, north of Piney Branch Parkway, except on a small triangle made by Sixteenth Street and Arkansas Avenue, where it was impracticable to erect an apartment house, as shown by the proposed intervening petition (par. 21, App. 60 and 61).

Map III shows the situation on April 7, 1943, which was created by the judgment of the court below (App. 56). Parcel 70/100 is there zoned A, thereby permitting the erection of an apartment house, in a single family dwelling area.

This, as appellants see it, is a glaring example of “spot zoning.” If they may be pardoned for using a colloquialism, “It sticks out like a sore thumb.”

The only areas shown on the maps where an apartment house may be erected are A (colored purple); B (colored

orange); C (colored blue)); Zone D is not involved in any property shown on the maps. Zone B (colored orange) is already completely built up, as is shown by the proposed intervening petition (App. 61).

Under the Zoning regulations apartment houses cannot be built in A—Restricted; A—Semi-Restricted or B—Restricted areas. These facts do not seem to have been clearly presented to the court below, as they might have been by the original defendants, and that is one of the reasons why the appellants sought to intervene.

If this court is inclined to treat this record and “take jurisdiction of this case on the papers before us as an appeal of right” as it did in the case of *George H. Leigh, Bankrupt*, No. 8631, decided December 23, 1943, then it should on this record reverse the decree of April 7, 1943 and direct a dismissal of the complaint.

REPLY TO OTHER FACTS DISCUSSED BY APPELLEES

Prior to the change of zoning in 1941, a minority report was filed by the Zoning Advisory Council, in which it was said:

“The present apartment house zoning of this 2.07 acre tract at 16th and Shepherd Street is by no stretch of the imagination a part of any comprehensive plan as the zoning law requires. It is in fact an outstanding case of spot zoning and constitutes an opening wedge for further apartment house zoning north of this point.”

The entire minority report is attached hereto (Exhibit IV) as an indication of what appellants can show, if they are permitted to offer evidence on the subject. John Nolen, Jr., who signed the report is the Director of Planning of the National Capital Park and Planning Commission.

On April 19, 1943 (after the decision by the court below),

The National Capital Park and Planning Commission wrote a letter to the Zoning Commission, in which it said:

“In the opinion of the Commission this decision constitutes a definite threat to the principles of comprehensive zoning and city planning, and to the powers of the Zoning Commission to make changes in the zoning plan from time to time as conditions change in the various parts of the city. The Commission urges that all practical means be adopted to obtain a reversal of this decision.”

This letter in its entirety is attached (Exhibit V). The appellants proffer to prove the facts related in this letter, if they are permitted to offer evidence.

On the subject of taxation against 70/100 (appellees' brief, p. 9) it is suggested that the comparisons made by the appellees were not germane to the controversy. But if they were germane, it is urged that the rates should have been checked with other properties on Sixteenth Street, zoned for homes. What comparison for assessment can there be between property on Sixteenth Street and property far removed from Sixteenth Street?

This is another example that will becloud the issue by the introduction of matter concerning private rights and monetary gains and losses, whereas the real issue is one of public interest and good zoning. The real question is the right of the community to have a good zoning plan, and not the right of an individual to monetary gain.

Lord's letters (App. 21), disclosed that certain of the developers of Crestwood had a private agreement not to oppose an apartment house on 70/100. There is nothing significant about other appellants' failure to inquire. The place looked like a park, the salesmen for the Crestwood developers told many of the purchasers that it was park property, the park property coalesces with it.

Page 10—(c) Appellees' Brief. Poretsky applied for a building permit after the application to rezone had been

filed (App. 7 and 29). Possibly some of the other expenses to which he refers were incurred thereafter. At any rate, he knew the chances he took when he signed his contract. His contract from its very terms showed he was buying a law suit (App. 13, *et seq.*).

Page 11 of Appellees' Brief. The question of inquiry is beside the point. Neither Machen nor Poretsky, nor any other property owner or purchaser has any vested interest in any particular zoning. Zoning is changed as fitness requires. It is altogether a question of what is the best thing for the District and the community. Zoning is a distribution of uses by districts—not by lots. That is the sole purpose of zoning laws and zoning commissions. They cannot adjudicate cases between parties.

Machen and Poretsky cannot say that the zoning could not be changed after they made a contract. There is in no contract with the District to keep the property zoned for an apartment and none with the members of the community. Crestwood did nothing to deceive Machen or Poretsky or to estop themselves. No one knew these things better than Poretsky. In his contract with Machen, he wanted Machen to agree that the zoning for apartments would be continued. He knew it might be changed. Machen refused to agree that the zoning would be continued. Poretsky took the chance (See the contract and other pertinent matter, App. 13, *et seq.*).

When 70/100 was zoned in 1933 to permit an apartment house, Crestwood subdivision had not been started. Machen or Poretsky could have put up an apartment house then, but no such community as Crestwood would have developed.

Page 11—Par. 2 Appellees' Brief. It is wondered what appellees would have had Labofish to do. If he were not as vigilant as appellees said he should have been that does not estop the other appellants, and it does not estop the Capital of the United States. The delay is explained by the record. It was time taken up trying to persuade the Zoning Commission and the Corporation Counsel's office

to appeal the case (Par. 32, proposed intervening petition, App. 64).

In the case of *Hadacheck v. Sebastian*, 239 U. S. 394, 60 Law. 348, the court said (Citation from page 410 Orig. Ed. page 356 Lawyers):

“* * * It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest can not be asserted against it because of conditions once obtaining. *Chicago & Alton R. R. v. Tranbarger*, 238 U. S. 67, 78. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community.”

Dillon on Municipal Corporations, 5th Ed., Vol. 1, Sec. 301, says:

“Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively styled ‘Police Laws or Regulations.’ It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true; it can not be taken from him for any private use whatever, without his consent, nor can it be taken for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not unreasonably to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally.”

Page 12 (a) Appellees' Brief. It is immaterial what might have been done years ago. The question is, what is the situation as it exists today? A slaughter house could have been built upon parcel 70/100 once upon a time, but certainly not now. Would the City or the community be better off from a planning point of view with an apartment house or without it? The Zoning Commission said it would be better off without it; the National Capital Park and Planning Commission said it would be better off without it, and more than seventy residents who attended the hearing before the Zoning Commission said the community would be better off without apartment house on 70/100. The court should have limited its determination to whether or not the orderly processes had been pursued and whether there was any evidence upon which the Zoning Commission could have reached its decision.

Page 12 (a) 2—Appellees' Brief. While the appellees say that an attempt was made to single out 70/100 and that the triangular tract opposite was not rezoned, the best answer to that is that the subject is too small to ask this court to notice. It is a parcel of ground of about one thousand square feet on which no practical apartment house could be erected (App. 61). *De minimis non curat lex*.

Page 13 (b)—Appellees' Brief. Appellees end paragraph B on page 13 with the statement, "Certainly no further comment is necessary." Just what can this mean? The majority could not live within one block, for example, because one block would not contain the majority. A glance at the map on page 67 of the appendix will make the appellees' remark absurd. Again the character of the neighborhood is demonstrated. Single family communities are necessarily spread out over wide areas.

Page 13 (c)—Appellees' Brief. The appellees here show their disregard of covenants in deeds given to Machen to others preventing them from erecting apartments and do not answer the questions put by the proposed intervening

petition. On one side, there is a commercial enterprise. On the other, a community of fine homes, which the commercial enterprise will ruin. The Machens by the covenants they placed in deeds to home builders established the character of the neighborhood as one of detached single family dwellings, except for the covenants in the deeds to Pincock and Ehle, in which they estopped those grantees from objecting to an apartment house (App. 62, *et seq.*).

Throughout this case appellees are treating this matter as of eminent domain rather than one of police power.

The whole question here is not whether Poretsky is going to lose money but what is the best for the City.

Should the court decide with Poretsky regarding 70/100, it is easy to see what can be done to destroy the entire system of zoning.

The character of a community is determined by the buildings actually constructed in it and not by the type of buildings that could have been constructed in it at some previous time. This is fully recognized in the continuing power given to the Zoning Commission to make changes and its only reason for being is to make changes. Zoning is a matter of public trend.

AN ATTEMPTED INTERFERENCE WITH THE ADMINISTRATIVE REMEDY

Since the preparation of the original brief in this case, four decisions have been made that seem to be pertinent to this inquiry.

Switchmen's Union v. National Mediation Board, No. 48 Supreme Court United States, Nov. 22, 1943.—Co-op. Ed. Present Term, page 89.

General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Pacific Lines of Southern Pacific Company v. Southern Pacific Company, et al., Nos. 27 and 41—Nov. 22, 1943—Supreme Court U. S.—Co-op. Ed. Present term, page 112.

General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad, an Unincorporated Association v. Missouri-Kansas-Texas Railroad Company, et al.—Supreme Court of the U. S. No. 23—Decided Nov. 22, 1943—Co-op. Ed. Present term, page 104.

Engineers Public Service Company, et al. v. Securities and Exchange Commission, No. 8394, in the U. S. Court of Appeals for D. C., Nov. 22, 1943.

From the last case, on page 22 of the opinion, we cite the following:

“Moreover, a federal District Court has no jurisdiction to enjoin the Labor Board from holding a hearing and deciding whether the jurisdictional facts exist when the charge is that an employer has been engaged in interstate commerce and has been guilty of unfair labor practices under the Labor Act. The power to prevent any person from engaging in unfair labor practices affecting commerce has been vested by statute in the Board subject to review by the Circuit Court of Appeals, and since the employer has thus been given adequate protection against illegal action on the part of the Board, no injunctive action by the District court is necessary or proper.” *Myers vs. Bethlehem Corp.*, 303 U. S. 41.

Appellees, page 14 of their brief, say that this issue was not raised in the court below and that therefore the appellants “indulged in an entirely new issue.” One of the grievances of the appellants is that they have not been heard in the court below. They have asked for leave to intervene and to be heard. There is nothing that the appellants could have done that could have given the court jurisdiction. The court in the last case cited said:

“The Federal District Court has no jurisdiction to enjoin the Labor Board.”

The appellants paraphrase that by saying that the Dis-

Offered by counsel at the oral argument

Add recent case

strict Court had no jurisdiction to enjoin the Zoning Commission.

In the case of *Marblehead Land Co. v. Los Angeles*, 47 F. (2) 528, 532, cert. den. 284 U. S. 634, the court said:

“The legislative body entrusted with the police power has a wide discretion which cannot be interfered with by the courts. Their laws or ordinances enacted in pursuance of the police power are invested with a strong presumption of validity.”

And in the case of *Geneva Investment Co. v. St. Louis*, 87 F. (2) 83, 90, the court said:

“With the wisdom or expediency of the ordinance we are not concerned. If it is within the legislative power of the city, all presumptions must be indulged in favor of its validity.”

As the Supreme Court of Connecticut said in the case of *Walkinshaw v. O'Brien*, decided June 4, 1943, and reported in 32 At. (2d) at page 547, in quoting there another case cited, said:

“Whenever the absence of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed upon before it can move one further step into the cause as any movement is necessarily the exercise of jurisdiction.”

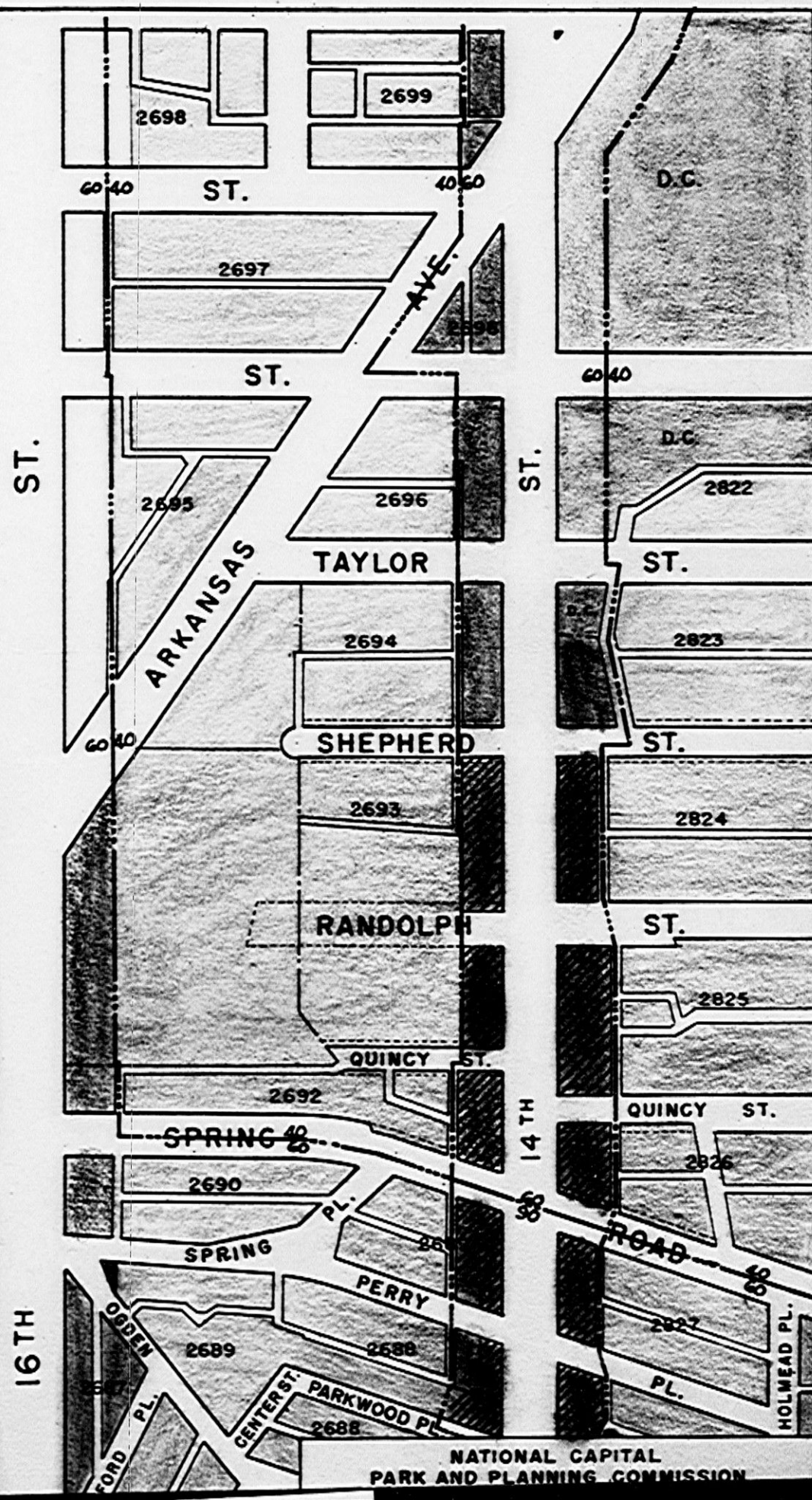
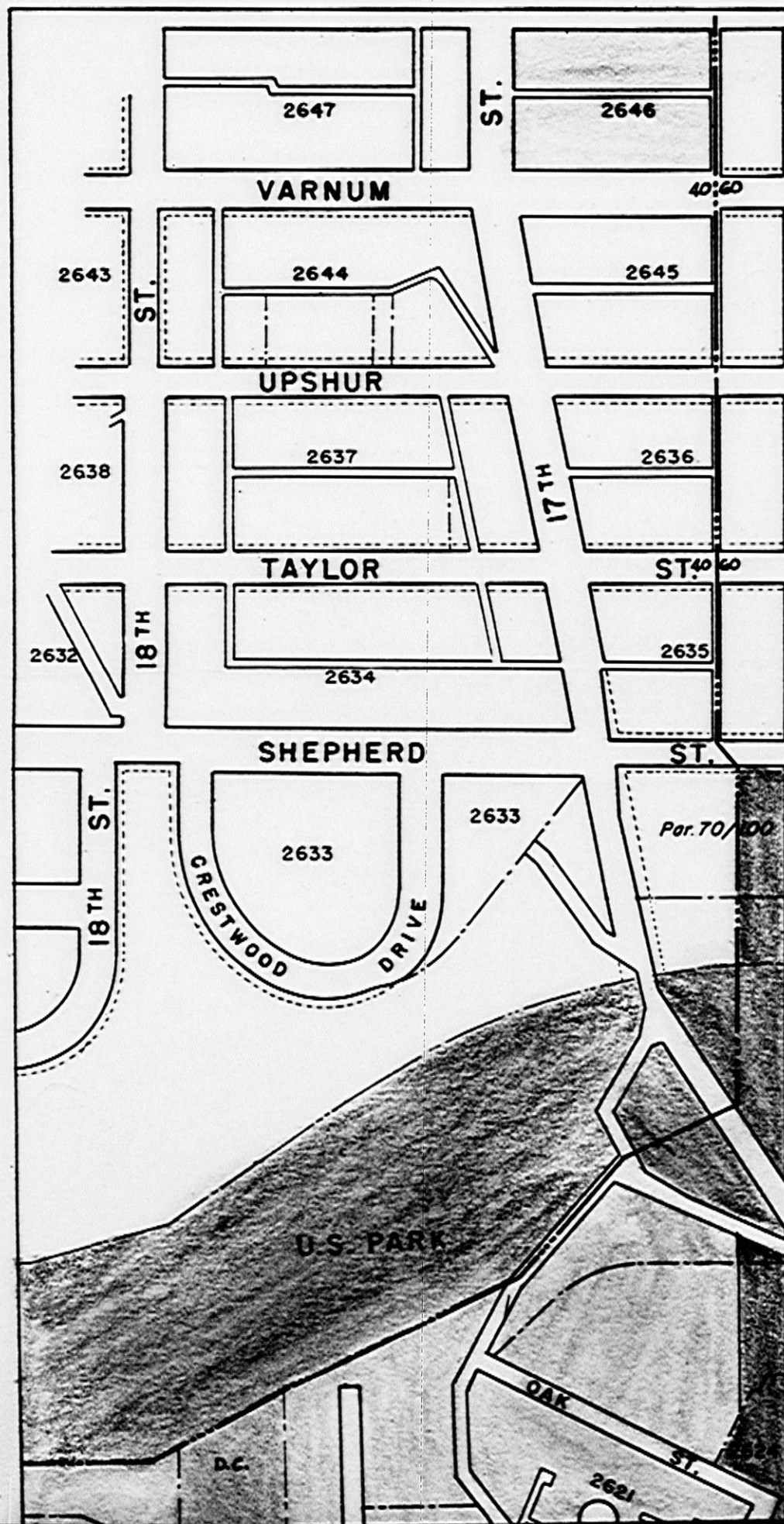
The case of *Nectow v. City of Cambridge*, 277 U. S. 183; 72 Law. 842, is cited by appellees on page 17 of their brief. Appellants simply ask the court to consider the physical facts involved in the case. This case and those cited in appellees' brief were, of course, before the recent cases which are cited in the appellants' brief (p. 21, *et seq.*). As stated, (p. 24 appellants' brief) a number of suits have been filed which attempt to control the action of the Zoning Commission but these decisions are to be held modified by subsequent adjudications which have already been cited.

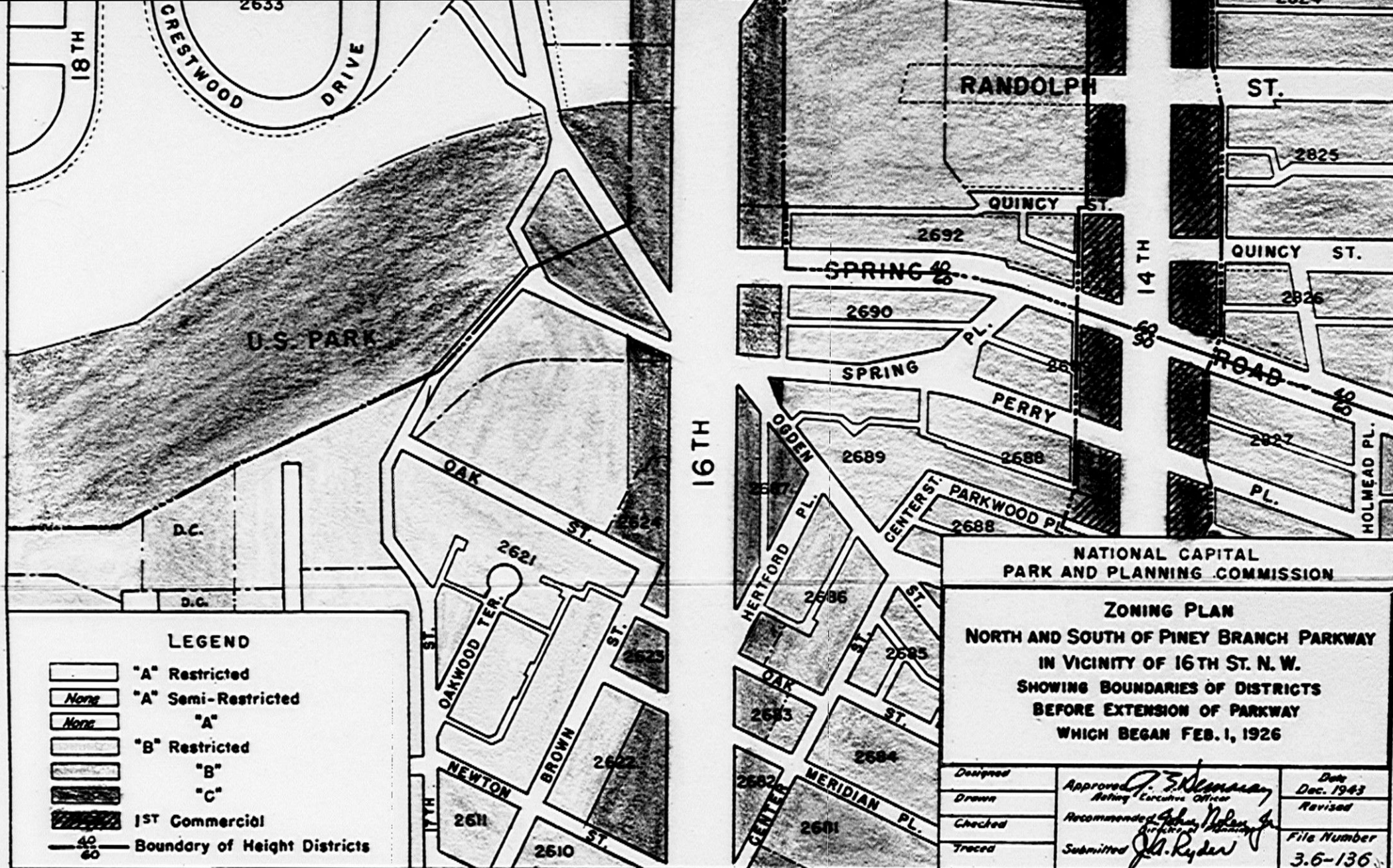
The case of *Zahn v. Board of Public Works*, 274 U. S. 325; 71 Law. 1074, is similar from a factual standpoint to the *Nectow case* cited above, except that on the facts of the *Zahn case* it reached a different conclusion from what it did in the *Nectow case*. In the *Zahn case*, the court said (328 Orig. Ed. 1076 Law. Ed.):

“The settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.”

Respectfully submitted,

H. WINSHIP WHEATLEY,
1010 Vermont Ave., N. W.,
Washington, D. C.,
Attorney for Appellants.



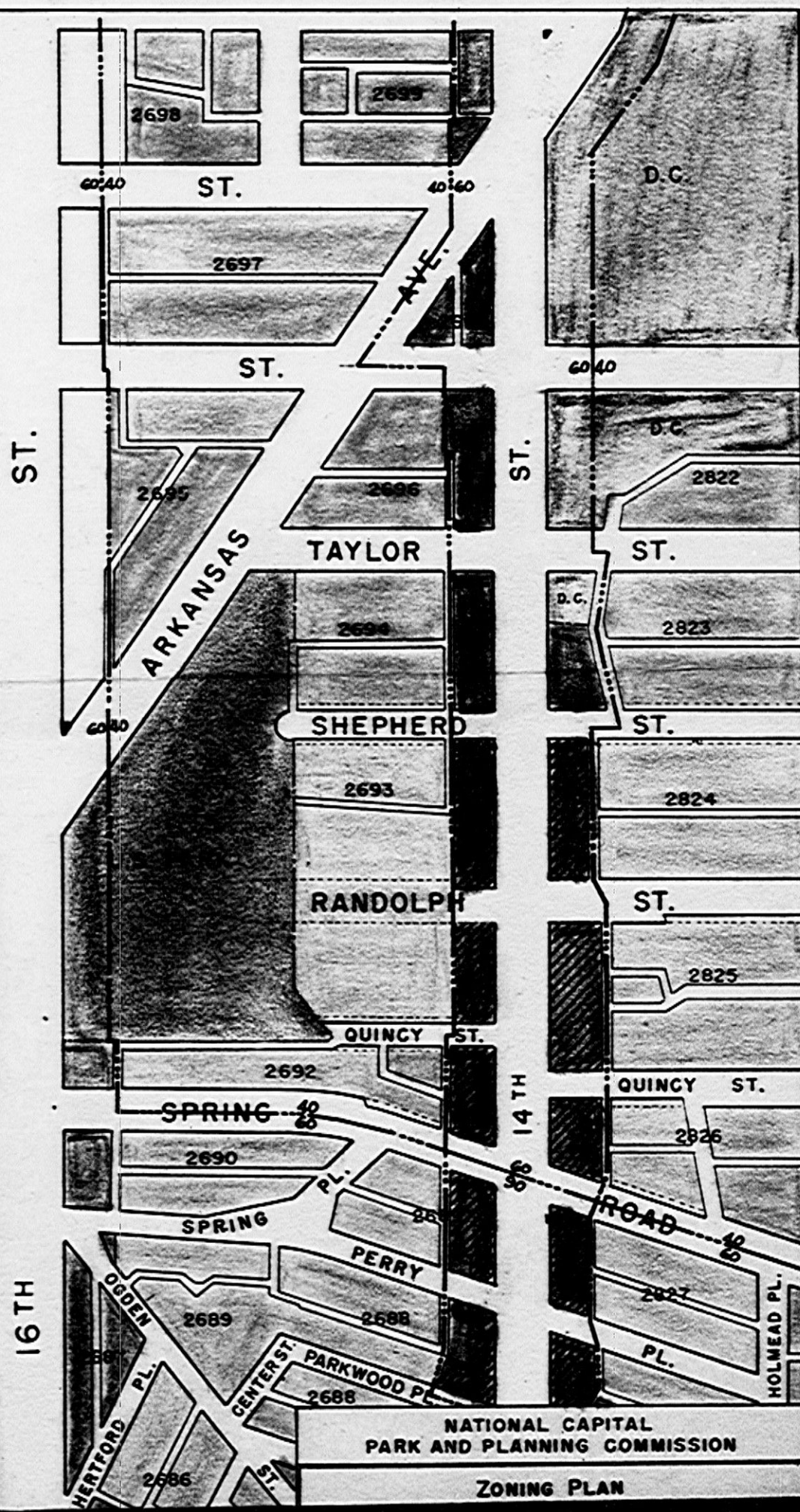
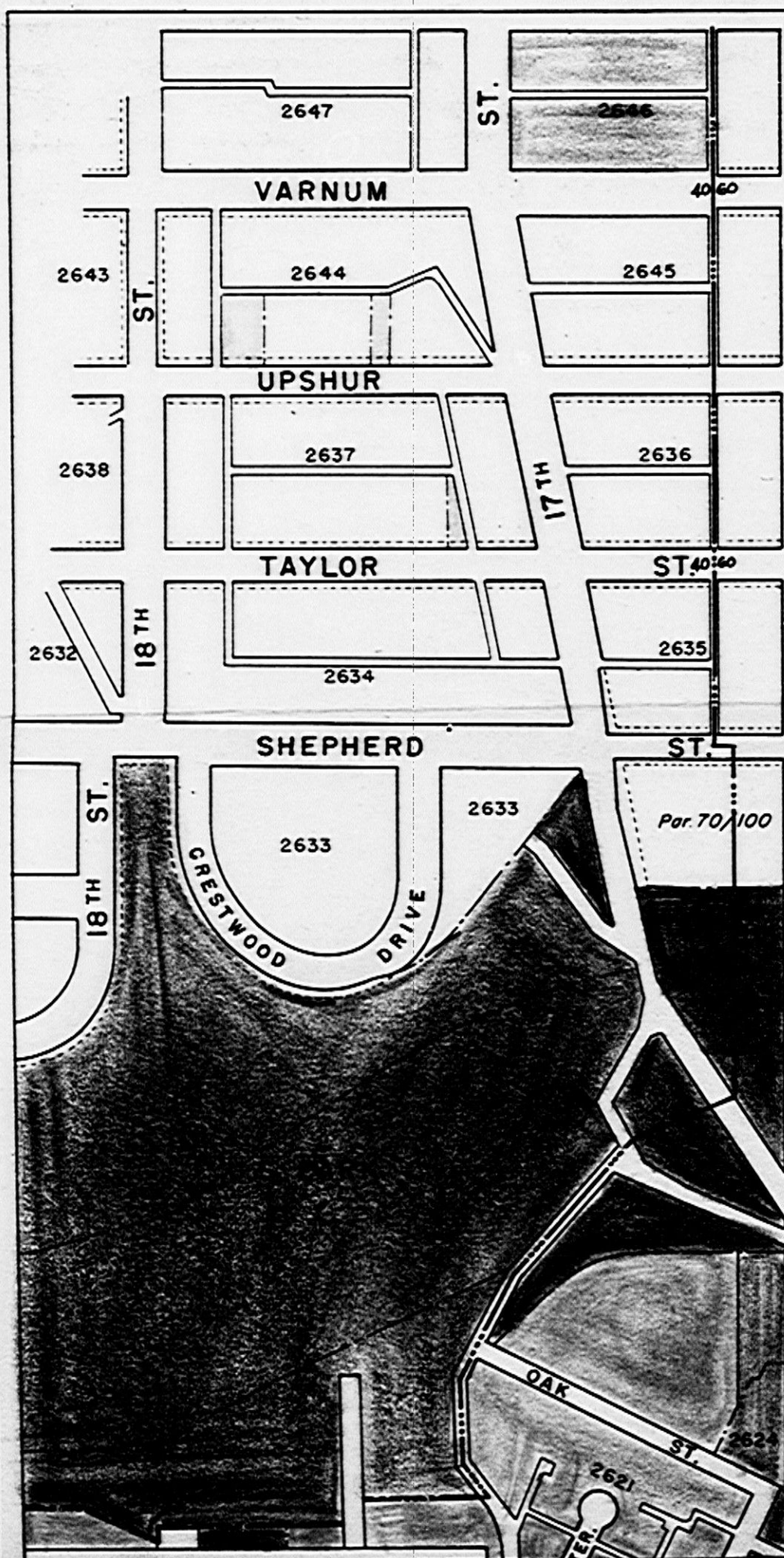


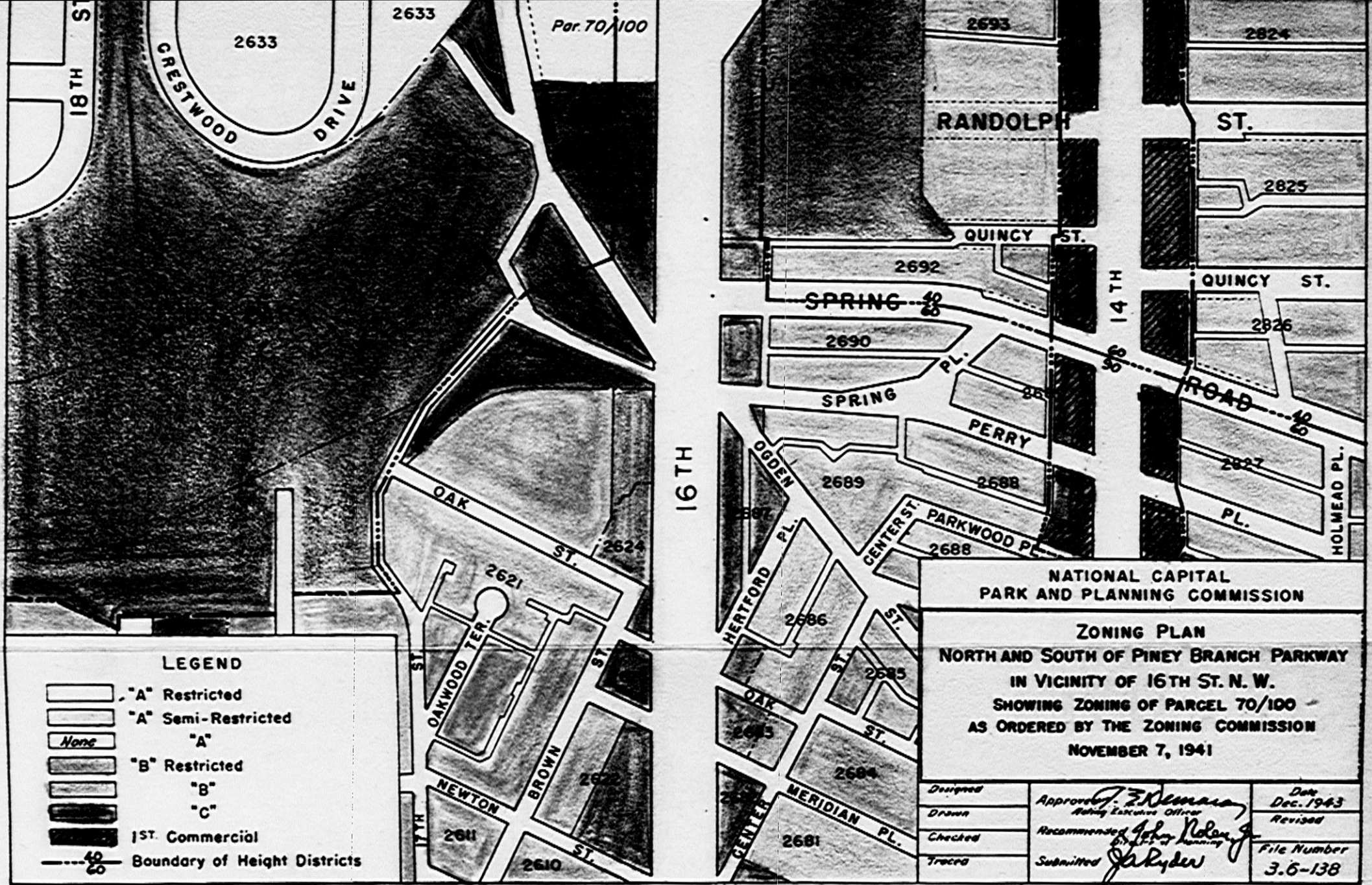
MAP I. Portion of Zoning Plan of the District of Columbia Prior to Enlargement of Piney Branch Parkway

APPELLANTS' NOTE

Under the Zoning Regulations of the District of Columbia apartment houses cannot be built in "A" Restricted, "A" Semi-Restricted, or "B" Restricted areas. Dwellings in such areas may be only of the single-family type.

The above portion of the zoning plan of the District of Columbia, prior to the enlargement of Piney Branch Parkway, shows a comprehensive zoning plan under the conditions existing at that time (1926) with Shepherd Street as the dividing line between the single-family dwelling area to the north and the multifamily (apartment house) area to the south. Development of the area immediately north of Piney Branch Parkway, which is known as Crestwood, was not commenced until late in 1937.



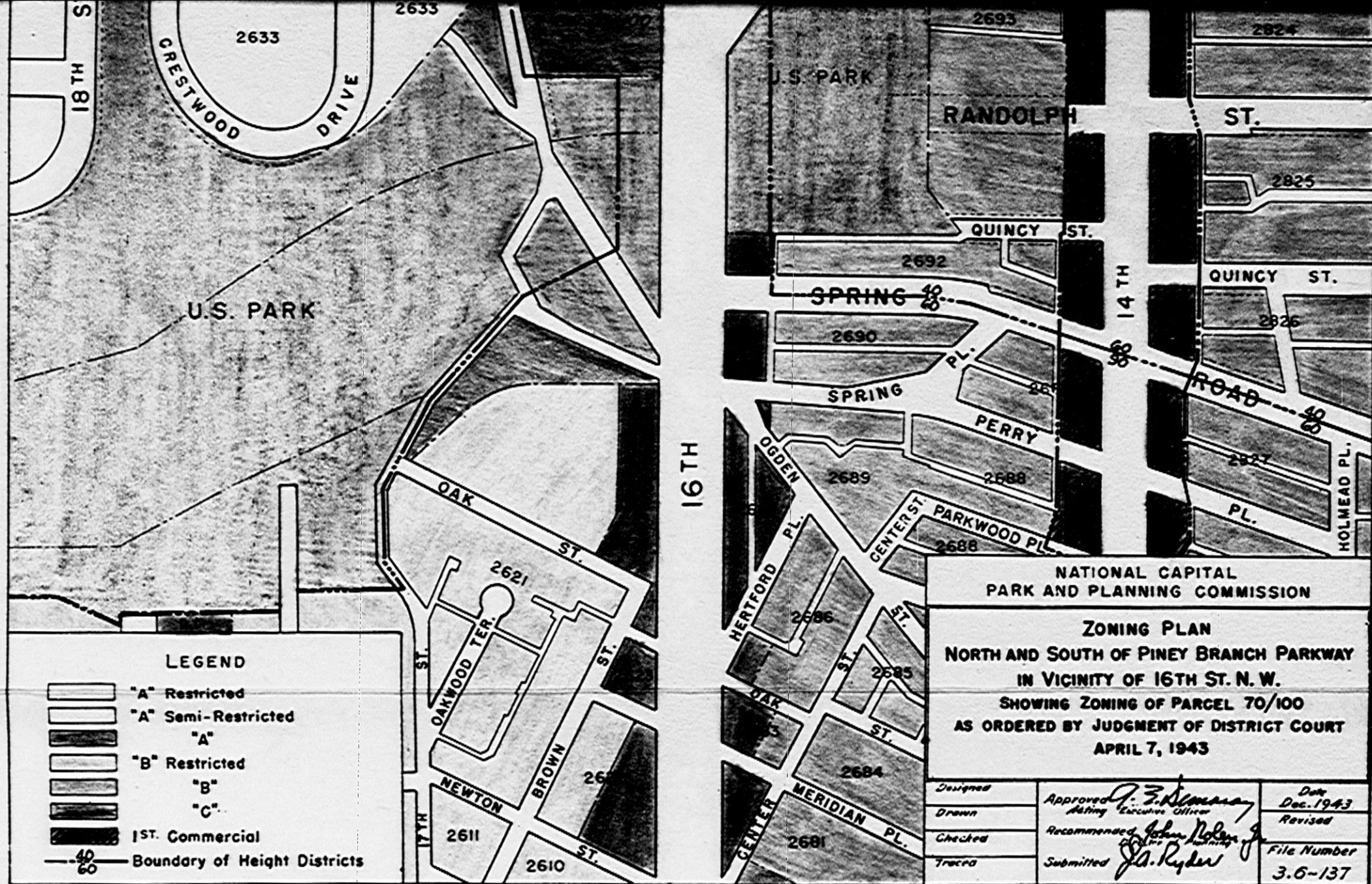


MAP II. Same Portion of Zoning Plan of the District of Columbia After Enlargement of Piney Branch Parkway

APPELLANTS' NOTE

Under the Zoning Regulations of the District of Columbia apartment houses cannot be built in "A" Restricted, "A" Semi-Restricted, or "B" Restricted areas. Dwellings in such areas may be only of the single-family type.

The above portion of the zoning plan of the District of Columbia, after the enlargement of Piney Branch Parkway, shows that after the Parkway had been enlarged that it became the logical dividing line between the single-family dwelling area to the north and the multi-family (apartment house) area to the south. It is obvious that Parcel 70/100 belongs to the single-family dwelling area which extends to the north and west of Parcel 70/100 and embraces all of the area in the vicinity of Sixteenth and Shepherd Streets north of Piney Branch Parkway. It shows a comprehensive zoning plan as determined by the Zoning Commission after the enlargement of Piney Branch Parkway and the major improvements made in 1939 and 1940.



MAP III. Same Portion of Zoning Plan of the District of Columbia as it Would Be if the Lower Court is Sustained

APPELLANTS' NOTE

Under the Zoning Regulations of the District of Columbia apartment houses cannot be built in "A" Restricted, "A" Semi-Restricted, or "B" Restricted areas. Dwellings in such areas may be only of the single-family type.

The above portion of the zoning plan of the District of Columbia, as it would appear if the lower court is sustained, shows the introduction of a multifamily (apartment house) spot into a single-family dwelling area, and the breaking down of a neighborhood of single-family dwellings, as established by the Zoning Commission, along and west of Sixteenth Street and north of Piney Branch Parkway. This is patently spot zoning.

EXHIBIT IV

Copy

October 7, 1941

MINORITY REPORT OF THE ZONING ADVISORY COUNCIL.

CASE #2

OCTOBER 8, 1941 HEARING

Application of C. V. Maudlin, et al. requesting an amendment to the zoning map by change from Residential, 60' "A" Area to Residential, 40' "A" Restricted Area parcel 70/100, located at the southwest corner of 16th and Shepherd Streets, N. W.

The present apartment house zoning of this 2.07 acre tract at 16th and Shepherd Streets is by no stretch of the imagination a part of any comprehensive plan as the zoning law requires. It is in fact an outstanding case of spot zoning and constitutes an opening wedge for further apartment house zoning north of this point.

While the original zone plan of 1920 may have had some basis for its adoption, conditions have materially changed since this plan was formulated. As it is the duty of the Zoning Commission to keep this plan up to date, the new conditions are sufficient reason for the Zoning Commission to modify the original plan to conform. Of most importance perhaps is the fact that Piney Branch Parkway has been considerably widened and extended in the last 13 years at a considerable expenditure of public funds, definitely separating the private development north and south of the Parkway at 16th Street. South of the Parkway the zoning and development has been consistently and properly of the multi-family type. North of the Parkway to the District Line the development is entirely detached single-family residence of the most restricted character, *with the sole exception of the parcel in question*, which is thus granted a special privilege not enjoyed by any other property owner north of Piney Branch Parkway.

There are ample court decisions supporting the right of zoning authorities to change any unimproved property from a less restricted to a more restricted classification, if conditions change and it is necessary to the maintenance of the comprehensive character of the zone plan. In this case the enlargement of Piney Branch Parkway has made it a definite physical barrier between the multi-family development to the south and the subdivision and development with

single family detached homes of acreage property in the Crestwood section immediately to the north and west.

It is therefore recommended that the zoning of Parcel 70/100 be changed to "A" Restricted, with the 16th Street frontage in the 60' height district and the rear portions in the 40' height district, following the same plan as prevails for several miles to the north of this parcel.

(s) JOHN NOLEN, JR.

EXHIBIT V

NATIONAL CAPITAL PARK AND PLANNING COMMISSION.

Interior Building,
Washington, D. C.

The Zoning Commission,
District Building,
Washington, D. C.

April 19, 1943.

Gentlemen:

At the meeting of the National Capital Park and Planning Commission on April 16, the attention of the Commission was drawn to the decision of the District Court of the United States for the District of Columbia in civil action No. 14606, that the rezoning of the property owned by Harry Poretsky at 16th and Shepherd Sts. N. W., was void and should be vacated and set aside.

In the opinion of the Commission this decision constitutes a definite threat to the principles of comprehensive zoning and city planning, and to the powers of the Zoning Commission to make changes in the zoning plan from time to time as conditions change in the various parts of the city. The Commission urges that all practical means be adopted to obtain a reversal of this decision.

The action of the court appears to conflict with many of the provisions of Section II of the Zoning Act of June 20, 1938, as a reading of this section will reveal. The decisions of the higher courts in zoning cases are so frequently based on the fundamental relation of the issue to a comprehensive plan, that it would be reasonable to expect that if this phase

of the case in question were stressed in an appeal, an entirely different decision might be obtained. Certainly the desire to make the plan for 16th Street comprehensive, and to encourage the stability of the "A" Restricted district and of the land values therein, was a controlling motive in the action taken by the Zoning Commission in 1941. The decision of the Court apparently gives no weight to these motivations, so clearly stated in the law.

Your attention is also directed to several statements in the decision which are open to question as matters of fact. For example, it is stated that the property had been assessed for taxation on a valuation based on its availability for the erection of an apartment building though the records show that there has been no change in the assessment since 1930 when more than 2/3 of the property was in the "A" Restricted district. Furthermore, it is stated that this property is situated at the foot of a hill, when as a matter of fact most of it is above the grade of the adjoining streets. Another point, which it is in the power of the Zoning Commission to correct, is that the property immediately across 16th Street is zoned for apartments. The failure to remove this very small, detached and illogical residue of the former "C" Area district at the same time the Poretsky property was changed is, of course, unfortunate, but a condition that could be remedied readily by the Commission. One piece of spot zoning should not be allowed to justify another.

This Commission will be glad to cooperate in this matter if it can be of any assistance.

Sincerely yours,

U. S. GRANT, 3rd,
Major General, U. S. Army,
Chairman.

JN:HL

CC: Mr. Demaray.